IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 09-0431

STATE OF MONTANA,

Respondent and Appellee,

v.

JERRY PAUL GONZALES,

Defendant and Appellant,

APPELLANTS OPENING BRIEF

On Appeal from the Montana Thirteenth Judicial District Court
Yellowstone County, Gregory R. Todd

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I. ISSUE PRESENTED

A. Did the lower court err, in denying the motion to withdraw the guilty plea?

II. STATEMENT OF CASE

On December 6, 2007, Mr. Gonzalez was charged with attempted deliberate homicide, by Affidavit and Information filed with the District Court. DC# 1&3. On January 4, 2008, defense counsel Jeff Michael filed a Notice of Appearance. DC#24. On February 25, 2008, Mr. Gonzalez plead guilty to an amended charge of felony arson, pursuant to Sec. 45- 6- 103, M.C.A. The amended charge, which specified subsection (1) (a) of the statute, was filed at the inception of the guilty plea hearing. 2/25/08 hrg, TR, p. 2, DC# 29;31.

Defense counsel used a one page, multipart form, entitled "Acknowledgment of Waiver of Rights by Plea of Guilty" in which various handwritten written notations appear. The factual basis was written by Mr. Gonzalez' counsel. App. 4. The form did not designate either of the three subsections under the felony arson statute. Id.

Mr. Gonzalez saw the form for the first time in court the day of his guilty plea hearing and signed it, not in the jury box, but standing at the podium, with his counsel. He signed the form , at the podium, in open court. 5/12/09 hrg. TR, p.

105. He said he did not read it over completely and couldn't read it, without assistance, and that his attorney never reviewed it with him in advance of the guilty plea hearing. Id. pg. 106.

At the guilty plea hearing, the court learned that Mr. Gonzalez had trouble reading. 2/25/08 hrg, TR, p. 3. Mr. Gonzalez told the court that he did not understand the English language very well. Id. When the court addressed him and asked if he had problems understanding Mr. Michael, he said, "A little bit, but I can go." Id. When the court asked what he did to plead guilty, it did not question him about the specific subsection of the felony arson statute and ascertain if he understood all the elements of that charge. His attorney had to assist him and ask specific questions. Id, p. 9. Specifically, he asked:

" Jerry, on December 2, 2008, you started a fire purposefully or knowingly - or did you start a fire in your truck or your wife's truck? You were married, so it's in dispute whose truck it is but a truck that - your wife was in the truck, is that correct?"

Mr. Gonzalez responded - "Whatever it says in there". Id.

A presentence investigation was filed on May 19, 2008. DC# 37. On that same date, the court held a brief sentencing hearing. 5/19/08 transcript. Before the court imposed sentence, Attorney Michael advised the court that since the guilty

plea hearing, he and his client had had heated discussions about him wanting to withdraw his guilty plea. He had drafted a motion to withdraw the plea, and he did not know what his client wanted to do this morning. Id, p. 4. Attorney Michael ultimately said he needed to talk to his client on the record today to see what he wanted to do. Id, p. 5.

The court then asked if he wanted to talk to him off the record and Attorney Michael said, "No." Id. It then addressed him in open court, asking him what he wanted to do today, and he said he'd proceed with his sentencing. Attorney Michael, in open court, then said, "You understand I will not file to withdraw your plea" and that he would not be allowed to withdraw his plea. Id. p. 6. A further colloquy between counsel and his client occurred, regarding withdrawal of the plea, which ended with Attorney Michael telling his client, "If we go forward today, I don't want to hear any of it." Id.

Mr. Gonzalez was sentenced to ten years Department of Corrections commitment, with five years suspended. 5/19/2008, Transcript of sentencing; DC# 40-Judgment and Order suspending sentence.

On February 26, 2009, Mr. Gonzalez filed a motion to withdraw his guilty plea, which was supported by his affidavit. DC# 45 & 46. He filed a motion to compel discovery of his original client file, including all attorney work product and

notes of counsel and his investigator, asserting it was needed to pursue the motion to withdraw the guilty plea, on the basis of the ineffective assistance of counsel. DC# 50. Attorney Michael filed a response, asking the court to deny the motion, claiming he had copied the file two times already, and order the file produced, only if Mr. Gonzalez paid his office $750.00, or $1.00 per page. In his response, he responded to the allegations in the motion to withdraw the guilty plea, denied rendering ineffective assistance, and attached a letter his client sent him on January 31, 2008, in which he terminated his services. DC# 54, exhibit B.

The court ultimately denied the motion to compel production of the file, and ordered that it only be produced if the copying charge of $1.00/page was paid, citing to Montana ethics opinion No 95-0221. DC# 58.

The state filed its response to the motion to withdraw on March 31, 2009. DC# 52. On April 24, 2009, defense counsel filed an unopposed motion to reserve the filing of a reply brief until after an evidentiary hearing was held, and requesting a briefing schedule thereafter. D C#60.

On May 5, 2009, the state filed a motion for an order to preserve former defense counsel from disciplinary or malpractice claims. DC# 64. It requested that the court order former counsel to appear and testify, and further, that he be granted immunity from discipline of charges of malpractice for revealing

confidential information as is necessary to respond to the claims. Id, p. 2. On May 11, 2009, Mr. Gonzalez filed his objection to that motion, arguing that Gilham orders only applied to post conviction proceedings and the broad grant of immunity was prohibited and was contrary to the constitutional rights of access to the court, and public policy against granting immunity to government actors. DC# 69.

The court granted the state's motion for immunity and ordered former counsel to testify, on May 12, 2009. App. 3, DC# 70.

The court held a hearing on the motion to withdraw on May 12, 2009 and on May 20, 2009. Transcripts of hearing. On May 12, 2009, the defense presented the expert testimony of a licensed forensic psychologist, Dr Michael Butz, Steve Peek, from Alternatives, Inc., Mr. Gonzalez and his wife Kristi McKittrick. On May 20, 2009, former defense counsel Michael testified, and also his legal assistant, Kay Peltier.

At the close of the hearing defense counsel suggested that findings of fact and conclusions of law be prepared, but the court denied that request. TR, 5/20/09, p. 252.

The court denied the motion to withdraw the guilty plea in an order and decision dated June 2, 2009. App. 2, DC# 78. On July 27, 2009, Mr. Gonzalez filed his notice of appeal. DC# 79.

III. STATEMENT OF FACTS

Mr. Gonzalez is a disabled person, suffering from learning disabilities consisting of dyslexia, written language, spelling and reading. He is mildly mental retarded. 5/12/09 hearing, Tr, p. 19 (Testimony of Dr. Michael Butz). His educational level ended at the ninth grade and he reads at a second to third grade level. 5/12/09 Tr, pp. 18, 23. He and his wife have a son whose is seriously disabled. Id, p. 67. Mr. Gonzalez' past criminal record consisted of one felony, burglary, and several misdemeanor charges, including traffic offenses. In the past, when he has appeared in court, the judge has had to read out loud the legal documents, to ensure he understands them and the legal proceedings. Id, p 78. Attorney Michael did represent him in some of those past misdemeanor proceedings, but not all of them and most of them were revocations on the same charge. 5/20/09 Tr, p. 147.

Dr. Michael Butz examined Mr. Gonzalez and reviewed his educational and testing records, as well as the plea form used in this case and the presentence investigation. Id, Exhibit E. He testified that out of a sample of one hundred

peers, 99 would read better than Jerry. Id, p. 19. His tests and the results obtained that he administered to Mr. Gonzalez confirmed those of a prior psychologist that indicated "He is a boy who simply cannot deal with the printed word". Id, p. 22-23. His reading ability stayed at the first percentile all of his life. Id, p. 30. He stated that if an individual as Mr. Gonzalez was presented with an important legal document, as the plea agreement in this case, for the first time in open court, it would cause him anxiety and would tend to cause them not to make a very good decision. Id, p. 31. He noted the plea document was written probably at an eighth grade level. Id, pp.22-23.

On cross, Dr. Butz explained the concept of "yeah saying", in which a disabled individual will answer yes, because that's the obvious response and it preserves their dignity, so they do not look foolish in court. Id, p. 41. He postulated this was what occurred with Mr. Gonzalez'. Id. pp. 30-32.

Mr. Gonzalez stated in his affidavit in support of the motion to withdraw the guilty plea that he only talked to his attorney once about the plea bargain, before going to court to plead guilty. DC# 45, p. 2. He was dissatisfied with the plea negotiations, and that his attorney did not come to see him at the jail and explain the case and take a statement from him. 5/12/09 , Tr. pp. 99-100. He sent him a letter, dated January 31, 2008, about a month before he plead guilty, advising

Attorney Michael he was terminating his services and wanted his money refunded. App. 4; DC# 54, Exhibit B.

After he sent the letter, which he wrote with the help of another inmate, Attorney Michael sent his investigator down to see him. 5/12/09 Tr, p.110. Mr. Gonzalez told him to tell Mr. Michael to come himself, and he eventually went to see Mr. Gonzalez in person at the jail for the first time. Id. Mr. Michael swore at his client, refused to provide a refund of any of the flat fee or an itemized billing of the time and expenses incurred to date. Id, p. 111. Mr. Gonzalez testified that he felt intimidated. Id. p. 112. Attorney Michael again threatened that if he did not take the plea bargain, he would get an 80 year prison sentence. Id. He also promised Mr. Gonzalez and his wife that he'd get out to the Billings Prerelease and would be able to be with his disabled son, and he'd never see the walls of the prison. Id.p.71.

Mr. Michael did not send the plea form down to his client, before the guilty plea hearing and Mr. Gonzalez never saw the plea document, until he got to the courtroom the day of his guilty plea. Id. p 106. He never read it himself and it was never read to him. Id. p. 106.

Attorney Michael testified his business habit was to prepare the "plea form the morning before "…. and "I don't take it down to the jail and have him sign it at

the jail on this." 5/20/09 Tr, p.160. He claimed he reviewed the document with Mr. Gonzalez before the hearing, but could not provide specific circumstances of that review, whether it was by phone, or in person at the jail, or only in the courtroom setting. Id, p. 161.

Mr. Gonzalez stated he only signed it in the courtroom, because his attorney told him to. 5/12/09 Tr, p. 106. The only reason he told the judge he understood his rights, wanted to plead guilty, and was satisfied with his attorney, was because he wanted to get it over with, and he did not know how to complain about his lack of trust in his attorney's services. Id.p. 107., DC#45. He also stated in both his affidavit and at the hearing to withdraw his guilty plea that his wife was not in the truck when he set it on fire, and he was too afraid to correct his attorney when Attorney Michael told the judge that she was in the truck. Id.

After he was charged with attempted deliberate homicide in this case, he asked his wife, Kristy McKittrick, to have Attorney Jeff Michael represent him. 5/12/09 Tr, p. 91. She paid him about $10,000.00, but although the flat fee exceeded $500.00, no written fee agreement, or any letter was sent confirming the fee and the terms of Attorney Michael's engagement. Id.p. 70.

Attorney Michael testified that he represents clients in solely criminal cases and he does not go to see them at the Yellowstone Court Detention facility, as:

" I'm frankly, too busy to spend a whole lot of time sitting down any jail. (sic)and the other problem is, I have so many clients, if I go to the jail, I tend to get overwhelmed by everyone else wanting to talk to me and we don't get a heck of a lot done." 5/20/09 Tr, p. 154.

Attorney Michael claimed he took extra time with Mr. Gonzalez due to his disability. 5/20/09 Tr, p. 150. Both Mr. Gonzalez and his wife disputed that. 5/12/09 Tr. pp. 93,72. On direct examination, Attorney Michael described his manner of communicating with Jerry was to rely on his wife to convey relevant matters to her husband, because he knew she was in contact with him all the time. 5/20/09 Tr. pp. 154-55. On cross examination, he stated that he did not rely on her to discuss things with her husband and she was the "wrong one to rely on to explain anything to Mr. Gonzalez ." Id, pp. 185-86. Until May 19, 2008, however, Mr. Gonzalez was prohibited by the terms of his release order from any communication with his wife. DC# 14. Mr. Gonzalez stated Michael only came down once to see him at the jail for twenty minutes during the case. Id, p.93. That was after he fired him and demanded his money refunded. Id p. 110. He said telephone contact with his attorney was infrequent and he usually would end up talking to the office assistant. Id. p. 93.

Mr. Gonzalez said his constitutional rights were never explained to him, nor did his attorney review the discovery with him, or the statement he gave the police. Id. pp. 93. In particular, he wanted to review his statement with his attorney, as

that was important to him and to what charge he should be guilty of. Id p. 99. Motions to suppress were not explained to him nor were any filed. Id, p. 94. His attorney never explained what decisions Jerry would make and which ones his attorney was entitled to make. Id, pp. 94-95.

Attorney Michael maintained that his client understood his rights, from previous representation, and understood the charges against him, and the exact rights he was waiving when he plead guilty. 5/20/09 Tr, p.155, pp. 161-62. That opinion testimony was objected to by defense counsel as lacking foundation but the lower court overruled the objections. Id. When defense counsel attempted to cross examine Attorney Michael regarding their dispute over the withdrawal of the guilty plea, by referring to a standard from the American Bar Association Criminal Justice Section standard for the Defense function, specifically No.4-5.2, "Control and Direction of the Case", the state's objection to that line of cross examination was sustained by the court. 5/20/09 Tr, p.200-204. Counsel then made an offer of proof. Id, p. 204. Similarly, counsel attempted to cross examine Attorney Michael regarding the fee arrangements, in the context of Mr. Gonzalez attempting to terminate his services, the court sustained the State's objection, on the ground of relevance. Id, pp.188-90. Counsel made an offer of proof, stating that as it was a $8,000.00 flat fee, and Attorney Michael refused to make any refund, it was relevant to the issues of whether or not Mr. Gonzalez was able to withdraw his

guilty plea. Id. The lower court considered the evidence on the amount of the fee stricken, stating:

" You know, the amount of the fee is stricken, although obviously you got it in anyway. So if you want the Supremes to hear that, you've got it, but I don't see the relevancy of the amount." Id. at 189-90.

Defense counsel then attempted to cross examine attorney Michael on the time entered in his billings statement, and moved to enter Defense Exhibit J. Id, p. 191. The state objected and ultimately the court stymied counsel's opportunity to question prior counsel on that key document. Id, p. 194-95.

Attorney Michael told him he could get Mr. Gonzalez, with a plea to felony arson, ten years with five suspended. Id. p. 97. However, he did not interview the victim, nor file any motions to suppress. 5/20/09 Tr, pp. 187. He did not explain the difference between felony and misdemeanor arson. 5/12/09 tr., pp.97-98. He never sent his client any letters regarding his omnibus hearing, the plea offer, etc. Id. p. 103. No documents proving that Attorney Michael sent relevant documents to his client were ever produced, at either the May 12 or May 20 hearing. He admitted that he had no document explaining withdrawing the guilty plea. Id., p. 173.

Mr. Gonzalez told him he didn't want the deal, and he wanted to give his attorney a statement and discuss what actually occurred, but his attorney would not come down and discuss those matters with him. 5/12/09 Tr. pp. 99-100. He then became dissatisfied with Attorney Michael and he had another inmate prepare a letter to send to him, saying he no longer wanted his assistance. Id. p. 100; App. 4, DC# 54, Exh.B. He could not write the letter himself. Id,p. 101.

The only time he came to see him at the jail, was after he wrote to terminate his services and Attorney Michael came to talk him out of that and to advise he was not getting any money back. Id. That discussion was "pretty heated" as Mr. Gonzalez testified and his attorney swore at him. Id, p. 110. Ms. McKittrick testified that she paid him about $10,000. Id, p. 70. She stated Mr. Michael's office staff relied on her for the majority of their communications with Mr. Gonzalez. Id,p. 72. Mr. Gonzalez stated that he communicated with his attorney mostly through his wife, and if he talked to anyone at the office, it was Mr. Michael's assistant, Michelle. Id, p. Ms. McKittrick stated after her husband did not feel he was getting good representation, on February 19, 2008, she started calling other attorneys. Id, pp. 79-80.

Both Mr. Gonzalez and Ms. McKittrick stated that Attorney Michael promised them Jerry would go to Alpha House, at the Billings Prerelease, so he

could be home with her to help take care of Luke, their disabled son. Id, pp. 78,114.

Attorney Michael and the probation officer did have Mr. Gonzalez screened for the Billings Prerelease, but he was denied, likely due to their policy of not accepting individuals with arson convictions. Attorney Michael testified, although he only handled criminal cases and his office is in Billings, that he was unaware of that policy of Alternatives, Inc. 5/20/09 Tr, p. 221. He claimed he never promised Mr. Gonzalez and his wife that Jerry would go to prerelease. Id, p. 165.

Mr. Gonzalez said his former counsel did not come down and review his presentence with him, nor did he allow him to allocute at sentencing, or discuss in advance what witnesses or evidence he'd present at sentencing. 5/12/09 Tr, p. 115.

Attorney Michael stated that his office purportedly received a phone call from Mr. Gonzalez in August 2009, and that he left a message stating that he did not want to withdraw his plea but only wanted to be back with his family. 5/20/09 Tr, p. 180. No actual recording of that message was produced in court.

The court denied the motion to withdraw the guilty plea in a written order, finding that Attorney Michael had communicated almost daily with his client, had explained the plea bargain and the plea form in advance, and read it to his client, and that their past relationship assisted in overcoming Mr. Gonzalez's learning

disabilities. App. 2.DC# 78. It also found that Mr. Gonzalez had an extensive criminal record, and understood his rights, and the plea agreement. Id. p. 4-5. It found Mr. Gonzalez never said he wanted to proceed to trial, and that the two prong standards for the ineffective assistance of counsel were not met. Id, p.5. It found the plea was knowing and voluntary and that Mr. Gonzalez's learning disabilities did not impact his guilty plea. Id., p. 8.

IV. SUMMARY OF ARGUMENT

Mr. Gonzalez' guilty plea was involuntary, for a number of interlocking reasons, and when the totality of all relevant circumstances is carefully analyzed, there was ample good cause to withdraw the plea. The lower court erred in failing to allow findings of fact and conclusions of law, failed in its duty to ascertain all possible grounds for withdrawal of the guilty plea, and failed in resolving all doubts, therefore, in favor of the defendant, as the prevailing law requires.

More specifically, the lower court ignored the considerable relevance of former defense counsel's ethical lapses, which contributed to the coerced guilty plea. As former defense counsel took a flat fee, but then refused to refund any of it, when he was discharged, contrary to a Montana state bar ethics opinion, he placed his financial interest in irreconcilable conflict with his duty of loyalty and competent representation to Mr. Gonzalez, an under educated and learning

disabled individual. He also failed his client at almost every juncture of the case, by failing to meet with him to review discovery and his statement, not interviewing any witnesses, not filing pretrial motions, and most importantly, not resolving their conflict over withdrawing Mr. Gonzalez's ill- begotten guilty plea.

The final fatal flaw in this hasty guilty plea is the failure of the presiding court, to ascertain which variations of felony arson Mr. Gonzalez was pleading guilty to. The charging documents alleged a violation of subsection (1) (a) of Sec. 45-6-103, M.C.A., to wit, that he torched the property of another, a truck belonging to his wife, but by contrast, the plea acknowledgement form and the factual basis taken at the guilty plea hearing concern a violation of subsection (1) (c), which states distinctly different elements of causing a fire and putting others at risk of bodily injury or death. This defect in the plea colloquy undermines the integrity of the judicial process and constitutes good cause to allow the withdrawal of the guilty plea.

V. ARGUMENT

A. The applicable standard of review.

The applicable standard of review a district court's denial of a motion to withdraw a guilty plea is de novo, *State v. Warclub,* 2005 MT 149, ¶ 17, 327 Mont. 352, ¶ 17, 114 P.3d 254, ¶ 17,. The issue of whether a plea was entered voluntarily

is a mixed question of law and fact and the underlying factual findings are reviewed to ascertain if they are clearly erroneous. *Warclub*, ¶ 23. Findings of fact are clearly erroneous if they are unsupported by substantial evidence, the court misapprehended the effect of the evidence, or review of the record demonstrates that a mistake has been made. *Warclub*, ¶ 23.

Here, the lower court declined defense counsel's request to submit findings of fact and conclusions of law. 5/20/09 hearing, Tr, p. 252. Consequently, Mr. Gonzalez respectfully requests that this Court examine the record with careful scrutiny, and allow his counsel to advance arguments not earlier made, as the opportunity to make those arguments after the evidence was taken, was wrongfully denied. Defense counsel had timely filed an unopposed motion to submit further briefing after the evidentiary hearing. DC#60

B. Mr. Gonzalez' guilty plea was Involuntary. The lower court erred in finding there was not good cause to withdraw the plea.

The baseline statutory standard for determining if a guilty plea should be withdrawn is good cause. Section 46-16-105(2), MCA, allows a court to withdraw a guilty plea and substitute a not guilty plea where good cause is shown. "Good cause" includes involuntariness of the plea, but encompasses include other criteria as well. *Warclub*, ¶ 16.

As a preliminary matter, when a court considers a motion to withdraw a guilty plea on the grounds that it was involuntary, it must resolve all doubts in favor of the defendant. State v. Boucher, 2002 MT 114, ¶29, 309 Mont. 514, 48 P. 3d 21. Here, the lower court failed to apply this critical standard, and instead, resolved all doubts in the State's favor. App. 2, DC# 78. For example, it found that prior counsel had daily contact with the Defendant and his family for two months; App. 2, DC# 78, p. 7, but Mr. Gonzalez and his wife's testimony belie this finding. Moreover, prior counsel could not produce any letters to his client, memorializing the terms of the plea negotiations or sending his client the plea document itself. Most importantly, however, is that contact with Mr. Gonzalez' family cannot fulfill the duty to communicate directly with the client. This is especially true, as former defense counsel gave contradictory testimony, saying on direct that he relied on his client's wife, also the victim of the crime, to convey legal matter and documents to him, but on cross he stated he would never allow her to explain anything regarding the case to her husband. 5/20/09 Tr, pp. 185-86.

The lower court also found Mr. Gonzalez had "an extensive criminal record." Id, p. 7. However, he only had one previous felony conviction and several misdemeanors. It thereby placed undue emphasis on this factor. It wholly ignored the substantial testimony of Dr. Michael Butz, expert testimony that is unrefuted in the record, and which showed that Mr. Gonzalez learning disabilities

were significant and impacted his abilities to understand the guilty plea and related matters. 5/12/09 Tr., pp. 9-45.

1. The Fee dispute fatally affected prior counsel's representation and constituted coercion.

Where a guilty plea is induced by threats, or improper harassment, it is prone to attack as involuntary. State v. Lone elk, 2005 MT 56, ¶ 21, 326 Mont 214, 108 P. 3d 500.

Here, an unusual procedural posture presents, as Mr. Gonzalez attempted to fire his counsel before the guilty plea was taken, but was thwarted in doing do, due to prior counsel's intentional disregard of ethical rules on refunding disputed legal fees. He submits this presents an important but rare variation on coercive circumstances and as well constitutes record based ineffective assistance of counsel that the lower court glossed over.

Mr. Gonzalez sent a letter to attorney Michael and fired him on January 31, 2008, about three weeks before he entered his guilty plea on February 25. App. 4. DC # 54, Exh. B. In the letter, he also requested a refund, but instead of an accounting, the response he received, consisted of a statement by his counsel that

there were no refunds, and an intimidating exchange at the jail,[1] during which he was told he'd get an eighty year prison sentence if he did not take the plea offer. 5/12/09 Tr, pp. 110-12.

Attorney Michael had taken a hefty fee of about $10,000.00, well in excess of $500.00 and never provided his client a written fee agreement, as required by Mont. R. Prof Conduct 1.5 (b). 5/12/09 Tr., p. 70. Moreover, his fee was a flat fee, and when his client requested a refund, he denied that request , evincing the very conundrum that this type of specialized fee presents. See, e.g., State Bar Ethics opinion 080711, "fixed fees in criminal cases," which states, in part:

"Based upon the above ethics principles, and for the following reasons, the Committee discourages the use of descriptive labels such as "nonrefundable" or "earned upon receipt" for advance payment arrangements:

1. **A non refundable fee may compromise the client's unqualified right to terminate the attorney client relationship under MRPC 1.16(a).** See, e.g., In the Matter of Edward M. Cooperman, supra. **The client's absolute right to discharge a lawyer retained would be of little value if the client must risk paying for services not rendered. Such a situation could force the client to continue the services of an attorney in whose integrity, judgment or capacity the client had lost confidence.**

2. If the client discharges the lawyer prior to the fee being earned, the retention of a nonrefundable fee would violate the attorney's responsibility to refund to a client any advanced fee that had not been earned under MRPC **1.16(**d).

[1] Ironically, Mr. Gonzalez testified that the termination letter precipitated the sole jail visit he ever had from Attorney Michael. 5/12/09 Tr, p. 112.

3. A fee that is not earned is per se an unreasonable fee. **Thus the retention of an unearned non refundable fee would result in the lawyer collecting an unreasonable fee in violation of MRPC 1.5(a).”** (Emphasis supplied).

Paragraphs 1 and 2 of this excerpt from the ethics committee opinion foretold the exact dilemma, Mr. Gonzalez, an under educated and learning disabled client, faced with Attorney Michael’s flat fee practices. When he wanted to discharge Attorney Michael, as is his absolute right, and sent him a letter doing so, with definite terms, and asked for a refund, he was met with rebuke and swear words. 5/12/09 Tr, p. 112. **As the above noted opinion states, such a situation could force the client to continue the services of an attorney in whom the client had lost confidence.**

Moreover, Mr. Gonzalez’s desire to withdraw his plea, was very prompt, but was thwarted by prior counsel’s ethical lapse and lack of financial accountability to his client, in that he wholly refused any refunds to his client. Nor did he provide any type of realistic accounting and bill to this illiterate individual, to show exactly what services he had performed for him to date.

Thus, a direct casual connection between the ethical issue on the flat fee and the refusal of counsel to refund any amount was demonstrated by Mr. Gonzalez. He has shown the requisite prejudice and good cause, all at once, as if the fee had been refunded, he could have secured the services of another attorney and

proceeded on another track, with his serious felony case and with a legal counsel more open to communication and "face time" with their client.

This type of financial coercion, constitutes impermissible threats by legal counsel toward his client, and is good cause to withdraw the guilty plea.

Consequently, the lower court erred, both in limiting cross examination on this issue and by failing to factor in this circumstance in its order denying the motion to withdraw the guilty plea.

2. Prior counsel rendered ineffective assistance to his client, both in failing to investigate, advise and communicate with him and in falling to timely resolve the attorney/client dispute over withdrawing the guilty plea.

This Court has ruled that "ineffective assistance of counsel constitutes 'good cause' for withdrawal of a guilty plea [.]" Hans v. State, 283 Mont. 379, 410, 942, P.2d 674, 693 (1997) (internal citations omitted). "Where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Hans, 283 Mont. at 411, 942 P.2d at 693.

In this case, Mr. Gonzalez asserts that Attorney Michael delivered ineffective assistance of counsel by failing to communicate with him regularly, to explain his rights, to review the lengthy discovery and his own tape recorded confession. His testimony conflicted with that of his former defense counsel, and he asserts that the lower court abused its judicial discretion in finding in its order that Mr. Michael did regularly communicate and did properly advise him. App. 2, DC# 78. e Attorney Michael's opinion testimony was self serving and should have been excluded by the lower court, especially given the heightened bias and interest Attorney Michael had in assuring his questioned competence in the case, not to mention his significant financial interest in not having to give up the flat fee he took, without a written fee agreement.

An apt precedent for this case, are the highly similar facts and circumstances and the holding of Henderson v. State, 322 Mont. 69, 93 P.3d 1231, 2004 MT 173. There, a defendant entered a flawed Alford plea to a drug possession charge. This Court found markedly ineffective assistance of counsel, for the public defender's failure to perform numerous core defense functions, including:

1. Only meeting the client in person two times,
2. Spending a total of only four hours on the felony possession case,
3. Doing no investigation and filing no pretrial motions, and
4. Inadequate communications with the client on plea negotiations, including telling the court his client would plead guilty, when the client had not authorized it. Id, ¶6.

Mr. Henderson was not functionally illiterate, as Mr. Gonzalez. The deficiencies of his counsel's performance are virtually a mirror image of those herein. Mr. Gonzalez also requests that this Court take judicial notice of the State Public Defender's Standards for Practice, embodied in their practice rules and adopted in October 2009. While these postdate Attorney Michael's representation, Mr. Gonzalez asserts that these provide a gold standard for defense counsel practicing in Montana, which includes both public defender and private bar counsel. They set out definite procedures for guilty pleas and negotiations, including this highly relevant standard:

"**14. The Decision to Enter a Plea of Guilty**:

A. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution and explain to the client the full content of the agreement, as well as the advantages and disadvantages of the potential consequences of the agreement.

B. **The decision to enter a plea of guilty rests solely with the client; counsel should not tempt to unduly influence that decision.**

C. If the client is a juvenile being prosecuted as an adult, consideration should be given to the request that a guardian be appointed to advise the juvenile if an adult family member is not available to act in a surrogate role.

D. A negotiated plea should be committed in writing." (Emphasis supplied).

Attorney Michael unduly influenced his client's guilty plea decision, when he denied him the refund and also, refused to get off the case, and make way for new counsel, as requested. Instead, he threatened his client with an eighty year prison sentence. 5/12/09 Tr, p. 109. Nor did he ask that the terms of the plea and

its actual terms be memorialized in writing, including which subsection of the arson law, his client would plead guilty to. This failure infected the very integrity of the plea colloquy, for reasons to be later argued.

In particular, Mr. Gonzalez points to former counsel's failure to properly advise him on the withdrawal of his guilty plea, which he wanted to do, shortly after it was entered on February 25, 2008. The interaction between Mr. Gonzalez and his former counsel, on the record at the May 19, 2008 sentencing hearing, further shows the gross incompetence in how this key issue was mishandled. At that hearing, it was clear that Attorney Michael had failed to meet in a confidential setting with his client and discuss the pros and cons as to withdrawing the plea, before coming to court that day. Instead of preserving his client's confidentiality on this issue, he brought the situation, unresolved, into the glaring light of the open courtroom, and then coerced his client into proceeding to an unprepared sentencing hearing that very same day. 5/19/08 hearing TR, pp. 4-7.

The American Bar Association Standards for Criminal Justice, of the Defense function, are well- respected practice standards. Attorney Michael testified criminal defense was his exclusive specialty, and he is a member of the American Bar Association. Standard 4-5.2, Control and direction of the Case, states:

" if an attorney and client disagree on significant matters of strategy or tactics, then defense counsel should make a record of the circumstances, their advice and reasons, and the conclusion reached. Such record should be made in a way that preserves the confidentiality of the attorney client relationship."

Attorney Michael wholly failed his client in this key regard, not only for failing to resolve the dispute he and his client had over the guilty plea in advance of the public sentencing hearing, but also for his failure to maintain confidentiality when he rejected even the timely suggestion of the lower court, to speak to his client off the record, regarding the unresolved motion to withdraw the guilty plea.

Instead he subjected his learning disabled client, a person whom he had testified that he really liked, to a public vetting of a key disagreement he had with his client in open court, as follows:

Mr. Michael: You understand that I've written a motion, I haven't filed it until we…

Mr. Gonzalez: Mm-mmmm.

Mr. Michael: And you understand that I'm not going to file it?

Mr. Gonzalez : Yes.

Mr. Michael: You're not going to be allowed to withdraw your plea.

Mr. Gonzalez : (Nods head).

Mr. Michael: The sentence you receive here today is the sentence you're going to get.

Mr. Gonzalez: Mm-mmmm.

Mr. Michael: And you want to go forward with this?

Mr. Gonzalez: You're my lawyer.

Mr. Michael: Well, no, that's not the questions I want to hear.

Mr. Gonzalez: Yes, I do.

Mr. Michael: The point is, if we go forward here today, I don't want to hear any of more of that.

Mr. Gonzalez : Yeah, I hear you. I'd rather have just gone on with it." 5/19/08 Tr, pp. 6-7.

"The assistance of counsel as contemplated by the United States and Montana Constitutions contemplates that counsel do more than merely accompany the accused in court. Counsel must give assistance in the role of advocate, a role which is critical to just results in our adversarial system of justice."

Henderson, supra at ¶ 8. Undivided loyalty to one's client is also a mandatory component of the defense function. State v.Deschon, 2002 MT 16, ¶ 17, 308 Mont. 175, 40 P. 3d 391. Attorney Michael's representation was markedly compromised by his own financial interest in not having to refund the flat fee of approximately $10,000.00 that he took in this case. Thus, it comes as no surprise that he did properly advise his client, in a confidential setting, on withdrawal of the guilty plea. Why would he, create more work, for less pay?

3. The Defense has Demonstrated Ineffective Assistance of counsel, affecting the entry of the plea and the court's plea colloquy was inadequate, necessitating withdrawal of this flawed guilty plea.

The defense is aware of the precedent that states that in order to prevail on a claim of ineffective assistance of counsel in the setting of withdrawing a guilty plea, that this Court has ruled that the defendant must show that but for the ineffective assistance , the defendant would have proceeded to trial. State v. Cady, 2000 MT 353, ¶ 10, 303 Mont 258, 15 P. 3d 479, citing to Hill v. Lockhart (1985), 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210. Mr. Gonzalez asserts he has met this standard, as implicit in the filing of a motion to withdraw a guilty plea, is the clearly contemplated result, that such defendant, if successful, will be back at " square one", so to speak and thus will be headed once again towards a trial in their case.

The lower court found that Mr. Gonzalez never explicitly said he wanted to proceed to trial, and that when he left a phone message for his former counsel in August 2008, he thereby did not meet his burden on this essential element. App. 2, DC# 78, p. 7-8. Mr. Gonzalez responds that if he did leave such a message it was exactly the type of kowtowing to authority figures and " yeah saying" that Dr. Butz aptly described as the coping mechanisms someone like he, with significant

learning disabilities, uses to survive and attempt to negotiate with professionals more well- versed in the vagaries of the criminal justice system, than themselves.

Mr. Gonzalez submits the proper analysis is not that superficial nor simplistic and what he wanted was very clear- competent representation, a full explanation of all his options, and more effective plea bargaining that would provide him closure as to exactly what his culpability was. Key to this factor is that Mr. Gonzalez always steadfastly maintained that his wife was not in his truck, when he burned it. DC# 45, par. 5, p. 2. In this regard, while the lower court found he did not challenge the adequacy of the plea colloquy, Mr. Gonzalez points out that in his original motion, he specifically asserted that his guilty plea was taken under pressured and hurried circumstances and he did not understand the exact offense he pled guilty to. DC# 46, par. 3&4. Had the lower court allowed counsel to submit findings of fact and conclusions of law, he would have elaborated and clarified this critical point of law.

In fact, whether or not his wife was, indeed, in the truck, was key as to which subsection of the felony arson statute he might be guilty of. Subsection (1) (a) of 45-6- 103 was alleged in the amended information, states:

"(a) damages or destroys a structure, vehicle, personal property (other than a vehicle) that exceeds $1,500 in value, crop, pasture, forest, or other real property

that is property of another without consent;", whereas, subsection (1) (c) provides :

(b) places another person in danger of death or bodily injury, including a firefighter responding to or at the scene of a fire or explosion."

The factual basis for the guilty plea and that asserted in the amended charging documents simply do not match, and the lower court erred in failing to ascertain which subsection of the felony arson statute Mr. Gonzalez was pleading guilty to.

The amended affidavit and motion for leave to file, which Attorney Michael never testified he reviewed with his client in advance nor sent to him, and which the court never ascertained at the guilty plea hearing Mr. Gonzalez understood, alleged a violation of subsection (1) (a) of the felony arson law. This charge claimed that the truck did not belong to Mr. Gonzalez, but rather to his wife. DC# 29.

By contrast, the acknowledgement of rights and waiver document does not specify any subsection of Sec. 45-6-103, and the factual basis contained in paragraph 7 states that "I started a fire in my truck and my wife was in the truck." App. 4. Attorney Michael erroneously stated at the guilty plea hearing, that the amended information sets out that he intentionally started the fire, putting people at risk, but that is not what the charging document stated. 2/25/08 Tr, p. 4. The facts he then purportedly elicited from his client later, as a factual basis, only related to the subsection for which a person puts another at risk, by starting the fire. Id, pp. 9-

10. When the court addressed Mr. Gonzalez that day, at no time did it clarify this major conflict. 2/25/08 Tr.

Another primary factor for the withdrawal of a guilty plea, pertaining to good cause, is the adequacy of the court's interrogation. A guilty plea is not knowingly made, if the defendant does not understand what acts amount to their guilt. State v. Koepplin, 213 Mont. 55, 64, 689 P. 2d 921, 925 (citations omitted). Here there was a legitimate doubt, as to whether or not Ms. McKittrick was in the vehicle at the relevant time, and this doubt should be resolved in favor of the defendant. Boucher, ¶ 29.

While this Court has ruled that an admission for each element of the crime need not be extracted at a guilty plea; see, State v. Wise, 2009 MT 32, ¶14, 349 Mont. 187, 203 P. 3d 741; Mr. Gonzalez responds that where, as here and as in Henderson, supra, the defendant denied a key element and culpability, then the plea must be withdrawn, as matter of integrity in the judicial process. In fact, in the Wise case, this Court ruled that the guilty plea must be withdrawn as the lower court did not thoroughly ascertain that the defendant was, in fact guilty of the crime as alleged. Id, ¶ 15.

Consequently, the lower court's failure to find an adequate factual basis for this guilty plea is a violation of Sec. 46-12-212 (1) and casts significant doubt on the voluntariness of the plea. Moreover, prejudice has been shown as this is the

very point of evidence that Mr. Gonzalez justifiably complained his counsel did not discuss with him - exactly who was in the truck, who owned it, and what he told the police when he talked to them.

The lower court erred in not considering these "case specific" considerations when deciding if this ill- begotten plea was entered voluntarily and knowingly. Accord, State v. Mc Farlane,2008 MT 18, ¶ 17, 341 Mont 166, 176 P. 3d 1057.

VI. CONCLUSION

The guilty plea in this serious felony case was only secured by counsel's financial coercion of his disabled client. The lower court's order, when subjected to denovo review, must be reversed.

Respectfully submitted this _____ day of February, 2010.

_____

Penelope S. Strong
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionally spaced font of Times New Roman 14 points; is double spaced; Microsoft Word 2003, and consists of 7784 words, excluding the table of contents , table of authorities, certificates of service and of compliance.

Dated this _____ day of February, 2010.

By: _____
Penelope S. Strong
Attorney for Defendant /Appellant

CERTIFICATE OF SERVICE

I state that on the ___ day of February, 2010, I served true and accurate copies of the foregoing document upon each attorney of record, and each party not represented by attorney in the above-referenced District Court action as follows:

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